No. 31402-2-III
Consolidated with NO. 31404-9

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

NANAMBI I. GAMET,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable F. James Gavin

BRIEF OF APPELLANT

SARAH M. HROBSKY
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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2. Insufficient evidence was presented to prove beyond a reasonable doubt Mr. Gamet attempted to induce a witness to withhold information from law enforcement officers, withhold testimony, or to absent herself from trial, essential elements of the offense of tampering with a witness, as charged.

3. Admission of evidence of Mr. Gamet's prior convictions for violation of a protection order violated his due process right to a fair trial.

4. The trial court erroneously imposed a term of community custody that, when added to the term of confinement, exceeded the 60-month statutory maximum sentence for felony violation of a court order and tampering with a witness.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When evidence is admitted under ER 404(b), a trial court must give a limiting instruction to the jury that it can the evidence only insofar as it establishes a common plan or scheme, and not as proof of a defendant's character or criminal propensity. Did the trial court commit reversible error when it admitted evidence of prior acts to establish a

common plan or scheme, but refused to give a limiting instruction as requested by the defendant?

2. The constitutional right to due process requires the State to prove beyond a reasonable doubt every essential element of the crime charged. Essential elements of the crime of tampering with a witness are an attempt to "induce" a witness to withhold information from law enforcement officers, withhold testimony, or to absent herself from a trial. Here, where the evidence established that the witness freely chose to be uncooperative and Mr. Gamet stated the charges would be dropped if the alleged victim failed to appear at trial and she did not need to cooperate if she did not wish to do so, was Mr. Gamet's right to due process violated when he was convicted of tampering with a witness?

3. The constitutional right to due process guarantees a criminal defendant a fair trial. The admission of unfairly prejudicial evidence of prior crimes may violate a defendant's right to a fair trial. Did the court's erroneous admission of Mr. Gamet's prior convictions for violation of a protection order violate his right to a fair trial and due process?

4 RCW 9.94A.701(9) requires a court reduce a term of community custody where the combined term of confinement and term of community custody exceeds the statutory maximum sentence for the offense. Here, where the court imposed a 60-month term of confinement plus an

additional 12-month term of community custody on each of nine convictions of a Class C felony with a 60-month statutory maximum sentence, must the court reduce the term of community custody to zero months?

C. STATEMENT OF THE CASE

In 2010, Nanambi I. Gamet was convicted of assault in the third degree against his long-time girlfriend, Sandra Castillo, and the court issued a no contact order of protection prohibiting Mr. Gamet from contacting her. RP 504; Ex. 17. Ms. Castillo tried numerous times to have the order lifted, but the court repeatedly denied her requests. RP 491-92, 504.

In June 2012, Mr. Gamet was in custody on unrelated charges in Yakima City Jail and Yakima County Jail. Telephone calls placed by inmates in both facilities are recorded by Inmate Calling Services (ICS), an internet system accessible to law enforcement officers. RP 364. Yakima Police Detective Michael Durbin accessed ICS and listened to several recorded telephone calls from Yakima City Jail allegedly placed by Mr. Gamet to Ms. Castillo on May 8, 2012 and May 10, 2012. RP 370-71, 414-16; Ex. 3. Detective Durbin also listened to several recorded telephone calls from Yakima County Jail allegedly placed by Mr. Gamet to Ms. Castillo on June 26, June 27, June 30, and July 1, 2012. RP 372-

73, 612-13; Ex. 4, 5. He interviewed Ms. Castillo as part of his investigation into whether the telephone calls were violations of the no contact order. RP 726-27. Ms. Castillo was uncooperative, she insisted she was not a victim, and she did not want to assist in the prosecution of the charges. RP 728-30.

On August 21, 2012, Detective Durbin listened to a recorded telephone call allegedly placed by Mr. Gamet to Linda Prado, Ms. Castillo's niece, in which Mr. Gamet stated he mailed a letter addressed to her that he wanted given to Ms. Castillo. RP 510-11, 515-16, Ex. 6, 7. Detective Durbin went to Ms. Prado's address and intercepted the letter before she received it. RP 520, 524-25, 646; Ex. 1, 2.

Mr. Gamet was charged with three counts of "felony violation of a protection order - domestic violence," in violation of RCW 26.50.110(5) and 10.99.020, based on the telephone calls placed in May 2012. CP 18-19. He was separately with five counts of "felony violation of a protection order - domestic violence," in violation of RCW 26.50.110(5) and 11.99.020, based on telephone calls placed on June 26-27, 2013, and one count of tampering with a witness, in violation of RCW 9A.72.120, based on the letter he sent to Ms. Prado. CP 147-49. The matters were consolidated for trial. RP 12-, 15. Ms. Castillo appeared at trial only after being arrested on a material witness warrant. Ex. 23-24. She testified that

the no contact order was issued against her wishes, the issuing court denied her repeated requests to have the order lifted, she was not afraid of or intimated by Mr. Gamet, and she freely chose not to cooperate with the prosecution of the instant charges. RP 491-93, 495-96.

Mr. Gamet was convicted of all nine counts, as charged. CP 68-73, 174-85. On each count, the court imposed a 60-month term of confinement plus a 12-month term of community custody. CP 105-11, 201-08. However, the court declined to re-issue the no contact order, on the grounds he believed Ms. Castillo did not want the order. RP 947.

D. ARGUMENT

1. The trial court erred in failing to give a limiting instruction for ER 404(b) evidence.

Over defense objection, the trial court admitted evidence of the telephone calls placed on June 30, 2012 and July 1, 2012, eight weeks prior to the charging period for tampering with a witness, to show a common scheme or plan, pursuant to ER 404(b). RP 274-75, 569-73. Mr. Gamet then requested a limiting instruction, informing the jury that the uncharged telephone calls were admitted only to establish a common scheme or plan to the tampering charge. RP 290. The court refused the give a limiting instruction on the grounds the jury instructions specifically

listed August 20-24, 2012 as the charging period for the tampering charge. RP 290-91, 572-73. This was in error.

When evidence is admissible for one purpose but not admissible for another purpose, the court must restrict the evidence to its proper purpose and instruct the jury accordingly. ER 105; State v. Russell, 171 Wn.2d 118, 121, 249 P.3d 604 (2011); State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007). It is critical "to stress to the jury that the testimony was admitted only for a limited purpose and may not be considered as evidence of the defendant's guilt." State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990); accord State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (such caution to the jury is both "proper and necessary"). Failure to give an ER 404(b) limiting instruction requires reversal unless the error was harmless and did not materially effect the outcome of the trial. State v. Gresham, 173 Wn.2d 405, 425, 269 P.3d 207 (2012).

The error here was not harmless. In closing argument, the State played portions of the uncharged telephone calls and argued the recordings established Mr. Gamet was the person who placed the calls in violation of the no contact order. RP 889-94. But that argument was contrary to the purpose for which the calls were admitted, that is, to establish a common scheme or plan. In light of the State's reliance on the uncharged calls to

establish Mr. Gamet's identity, and the failure of the court to properly instruct the jury on the limited purpose of the evidence, it is likely the jury relied on the evidence for an improper purpose.

Reversal is required.

2. Insufficient evidence was presented to support Mr. Gamet's conviction for tampering with a witness.

a. The State was required to produce sufficient evidence to establish beyond a reasonable doubt every element of the crime of tampering with a witness.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Deer, 175 Wn.2d 725, 731, 287 P.3d 539 (2012). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Winship, 397 U.S. at 358; U.S. Const. amend. VI, XIV; Wash. Const. art. I, sec. 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); accord State v. Rose, 175 Wn.2d 10, 14, 282 P.3d 1087 (2012).

b. The State presented insufficient evidence to establish Mr. Gamet attempted to induce Ms. Castillo to withhold testimony, absent herself from trial, or withhold information relevant to a criminal investigation.

The State charged Mr. Gamet with tampering with a witness from August 20-24, 2012. CP 149. RCW 9A.72.120 provides, in relevant part:

> (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation ... to:
> (a) Testify falsely or ... to withhold testimony; or
> (b) Absent himself or herself from such proceedings; or
> (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation ....

The term "induce" is not defined by statute. By dictionary, "induce" is defined as "[t]o bring on or about, to affect, cause, to influence to an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on." Black's Law Dictionary 775 (6th ed. 1990). Here the no contact order was issued by a court following Mr. Gamet's conviction for assaulting Ms. Castillo. Ex. 17. Ms. Castillo never requested the order and she tried at least four times to have the order lifted. RP 491-92. At trial, she testified that she repeatedly informed the detective that she was not a victim in the present case, she was not afraid, threatened or intimidated by Mr. Gamet, and she did not want to cooperate with the investigation and prosecution. RP 493, 495-96. She also testified

that Mr. Gamet did not try to persuade her to act in any particular way, but, rather, the no contact order was issued against her wishes, the issuing court denied her repeated requests to have the order lifted, she was not afraid of or intimated by Mr. Gamet, and she freely chose not to cooperate with the prosecution of the instant charges. RP 491-93, 495-96.

To prove the charge, the State introduced two telephone calls placed on June 30, 2012 and July 1, 2012, as evidence of a "common scheme or plan." RP 274, 569-73. The State also introduced a letter from Mr. Gamet and mailed to Linda Prado, as well as a telephone call placed on August 21, 2012 by Mr. Gamet to Ms. Prado asking her to give the letter to Ms. Castillo. RP 510-11, 515-16, 520, 524-25, 646; Ex. 1, 2, 6, 7. This evidence was not sufficient for any rational trier of fact to find Mr. Gamet attempted to induce Ms. Castillo to testify falsely, withhold testimony, fail to appear at trial, or to withhold information from investigating officers.

First, the telephone calls on June 30, 2012 and July 1, 2012 were eight weeks before the charging period for the offense. In the June 30, 2012 call, the caller identified as Mr. Gamet stated that if the alleged victim of a protection order violation does not show up in court, the charges must be dropped, and that he believed his girlfriend would not show up in court. RP 623, 625, 626; Ex. 5. He also asked whether Ms.

Castillo had filed paperwork to have the protection order lifted, as he had in the earlier conversations of May 2012. RP 624; Ex. 5. In the July 1, 2012 call, the caller said, "[D]o what you gotta do, you know what you gotta do." RP 635; Ex. 5. None of these statements can reasonably be interpreted as an inducement for Ms. Castillo to fail to appear or otherwise fail to cooperate with the police, their investigation, or the pending trial against Mr. Gamet. Notably, whether Ms. Castillo filed another motion to have the protection order lifted was both irrelevant to the pending charges and consistent with her earlier requests to have the order lifted.

Second, in the letter intercepted by Detective Dubrin, Mr. Gamet wrote to Ms. Prado, in relevant part:

> Well, about Sandy, she needs just to hang up every time and not show up to anything anytime, anyplace. I'm going to trial soon. They have until the 4th of next month. I hope she just hangs up on them and I don't know why she even told them to take subpoena to her sisters. The point is to have zero contact **if she doesn't want to cooperate**, zero.
>
> It's very hard for me to deal with these emotions because she showed last time. If she does that again, I'm forced to go to trial. I hope and pray she doesn't say a single word to them and hang up every time. ... I know what I'm doing. I don't need her thinking she can help me by talking to them. She only hurts me and herself because one thing I do know in this confusing world is she loves me and I love her, too. ... They have to let me go if she don't show.

RP 710-11 (emphasis added); Ex. 2. Although the letter reflects that Mr. Gamet "hope[s] and pray]s]" Ms. Castillo will not cooperate, the letter

does not threaten her or otherwise attempt to prevent her cooperation, if she chose to do so.

The present case is similar to State v. Rempel, in which the defendant and the victim had been friends for years and had been intimate early into their relationship. 114 Wn.2d 77, 80, 785 P.2d 1134 (1990). The victim allowed the defendant to stay at her apartment while she was out of town but he refused to leave when she returned and allegedly attempted to have nonconsensual sex. Id. at 81. The defendant was arrested for criminal trespass and attempted rape, and for several days following his arrest, the defendant repeatedly called the victim from jail, apologized, asked her to drop the charges, and said "don't ruin my life." Id. According to the victim, she accepted only two or three of the defendant's calls and she was not willing to "drop the charges" even if she could do so. Id. at 81-82. Based on the calls, the defendant was charged and convicted of tampering with a witness. Id. However, the Court reversed the conviction due to insufficient evidence, and noted, "[A]n attempt to induce a witness to withhold testimony does not depend only upon the literal meaning of the words used. ... [W]e consider the entire context in which the words were used, which also includes the prior relationship between defendant and [the witness] and her reaction to the phone calls." Id. at 83-84. The Court continued:

> [T]he effect of the inducement attempt upon the potential witness is not dispositive. One can be guilty of an attempt to induce a witness regardless of the effect upon the witness. However, the witness' reaction here is relevant because it tends to disprove the State's claim that the context of the words spoken shows an attempt to induce [the witness] to withhold testimony.

Id. at 84.

By contrast, in State v. Williamson, the defendant was charged with, inter alia, six sex offenses against a sixteen-year old child and a six-year-old child. 131 Wn. App. 1, 3-4, 86 P.3d 1221 (2004). Prior to trial, the defendant drove the older child to his attorney's office to recant on two separate occasions, offered a reward for his recantation, and asked the child to tell the younger child that her parents would go to jail if she failed to recant. 131 Wn. App. at 4. Based on this evidence, he was convicted of tampering with both children. Id. at 3. The Court affirmed the convictions, and distinguished Rempel, supra, on the grounds that Mr. Williamson specifically asked the older child to recant, he asked the older child to have the younger child recant, and he threatened that the younger child's mother would be incarcerated if she testified against him. Id. at 6.

Also, in State v. Andrews, the Court affirmed the defendant's conviction for tampering with a witness based on evidence that the defendant left several telephone messages for a witness who was subpoenaed to testify at his trial for motor vehicle theft, and stated in one

of the messages, "You need to fucking stay under the radar. Stay the fuck down and yeah just be like that girl. Now that's on, that, that is on the real because if it happens any different than yeah, you're gonna have some problems." 172 Wn. App. 703, 705, 293 P.3d 1203 (2013). The witness testified that the defendant also offered her $500 if she did not testify and the messages made her afraid to testify against the defendant for fear of retaliation. 172 Wn. App. at 705, 706. See also, State v. Lobe, 140 Wn. App. 897, 167 P.3d 627 (2007) (sufficient evidence of tampering with a witness where defendant "ordered" witness to withhold information from prosecuting attorney who was trying to locate a person protected by a no-contact order); State v. Gill, 103 Wn. App. 435, 13 P.3d 646 (2000) (sufficient evidence of tampering with a witness where defendant wrote 13-page letter to witness directing her to, inter alia, "get all of [the] charges dropped immediately," "[y]ou are facing the following charges if you don't comply with my requests," and "[d]o nothing and see what I can get done legally. You will be shocked at how much it will hurt....").

Here, Ms. Castillo testified that Mr. Gamet's calls had no effect on her decision to be uncooperative; that decision was entirely her own based on her unhappiness with the issuance of the protection order over her objection. As in Rempel, Ms. Castillo's reaction tends to disprove the State's interpretation of the telephone calls as an attempt to induce her to

be uncooperative. Admittedly, Mr. Gamet repeatedly reminded Ms. Castillo to file "paperwork" to have the protection order lifted. However, that has no bearing on the crime of tampering with a witness. The evidence did not establish beyond a reasonable doubt that Mr. Gamet attempted to induce Ms. Castillo to obstruct the investigation or to fail to appear at trial.

c. The proper remedy is reversal of his conviction for tampering with a witness.

Mr. Gamet's conviction for tampering with a witness was based on insufficient evidence he attempted to induce Ms. Castillo to withhold cooperation or to absent herself from trial. A conviction based on insufficient evidence cannot stand. State v. Veliz, 176 Wn. App. 849, 865, 298 P.3d 75 (2013). To retry Mr. Gamet for the same conduct would violate the prohibition against double jeopardy. Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Accordingly, Mr. Gamet's conviction for tampering with a witness must be reversed and the charge dismissed with prejudice.

3. The trial court deprived Mr. Gamet of a fair trial by admitting evidence of his prior convictions for violation of a protection order.

a. The fact of recidivism is not an element of the offense of violation of a protection order.

An element is "essential" if its "specification is necessary to establish the very illegality of the behavior." State v. Yates, 161 Wn.2d 714, 757, 168 P.3d 359 (2007). Although not using the term "elements," the United States Supreme Court has ruled "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, 397 U.S. at 364. However, the Court has made clear that this standard of proof does not apply to prior offenses, even where the fact of a prior conviction increases the maximum punishment for an offense. Almendarez-Torres v. United States, 523 U.S. 224, 241, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998).

In Almendarez-Torres, the Court found the fact of recidivism was not an element of the offense of reentry of removed aliens,[1] but, rather, a penalty provision that provided for an increased penalty based on recidivism. 523 U.S. at 226. The Court reasoned that Congress had not stated its intent that the fact of recidivism be considered an element, even

[1] 8 U.S.C. § 1326(a).

though it was contained in the same statute that set out the "elements" of the offense. Id. at 234. The Court noted that recidivism was a fact that "is neither 'presumed' to be present, nor need be 'proved' to be present, in order to prove the commission of the relevant crime." Id. at 241. The Court further noted the unfair prejudice that flows from evidence of prior convictions, and stated, "[W]e do not believe, other things being equal, that congress would have wanted to create this kind of unfairness in respect to facts that are almost never contested." Id. at 235. The Court then concluded "recidivism ... is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence." Id. at 243.

The Washington Supreme Court adopted the reasoning from Almendarez-Torres, and stated, "Traditional factors considered by a judge in determining the appropriate sentence, such as prior criminal history, are not elements of the crime." State v. Wheeler, 145 Wn.2d 116, 120, 34 P.3d 799 (2001). Thus, even though the fact of recidivism increases the punishment for an offense, that result does not necessarily make recidivism an element of the offense.

Moreover, the penalty classification of an offense is not an element of the offense, even if the classification is contained in the same statute that sets forth the elements of the offense. State v. Williams, 162 Wn.2d

177, 187-88, 170 P.3d 30 (2007). In Williams, the defendant was charged with bail jumping, in violation of RCW 9A.76.170, which provides, in relevant part:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.
> ...
> (3) Bail jumping is:
> (a) A class A felony is the person was held for, charged with, or convicted of murder in the first degree;
> (b) A class B felony is the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;
> (c) A class C felony is the person was held for, charged with, or convicted of a class B or class C felony;
> (d) A misdemeanor of the person was held for, charged with, or convicted or a gross misdemeanor or misdemeanor.

The Court concluded "Subsection (1) defines the elements of bail jumping and does not explicitly or implicitly reference the penalties in subsection (3)," and, therefore, the provisions of subsection (3) were not elements of the offense. 162 Wn.2d at 188.

Violation of a protection order, RCW 26.50.110, mirrors the structure of the bail jumping statute at issue in Williams and the reentry of removed aliens at issue in Almendarez-Torres, and provides in relevant part:

> (1)(a) Whenever an order is granted under this chapter, [or] chapter ... 10.99, ... and the respondent or person to be restrained

knows of the order, a violation of any of the following provisions of the order is a gross misdemeanor, except as provided in subsections (4) and (5) of this section:

(i) The restraint provisions prohibiting acts or threats of violence against, or stalking of, a protected party, or restraint provisions prohibiting contact with a protected party;

(ii) A provision excluding the person from a residence, workplace, school, or day care;

(iii) A provision prohibiting a person from knowingly coming within, a specified distance of a location;

(iv) A provision prohibiting interfering with the protected party's efforts to remove a pet owned, possessed, leased, kept, or held by the petitioner, respondent, or a minor child residing with either the petitioner or the respondent; or

(v) A provision of a foreign protection order specifically indicating that a violation will be a crime.

...

(4) Any assault that is a violation of an order issued under this chapter, [or] chapter ... 10.99, ... and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony

(5) A violation of a court order issued under this chapter, [or] chapter ... 10.99, ... is a class C felony if the offender has at least two previous convictions for violating the provisions of an order issued under this chapter, [or] chapter ... 10.99.

As in Williams and Almendarez-Torres, the acts which establish the "illegality of the behavior" that constitute violation of a protection order are set forth in subsection (1), and subsections (4) and (5) merely determines the circumstances which give rise to an enhanced penalty.

b. Evidence of Mr. Gamet's prior convictions for violation of a court order was not relevant to any element of the offense of violation of a protection order.

Evidence is admissible only if it is relevant. ER 402. Evidence is relevant if it makes a material fact more or less likely. ER 401. Even if relevant, evidence is inadmissible if its prejudice outweighs its probative value. ER 403.

Evidence of prior convictions is admissible only in limited circumstances. ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The purpose of ER 404(b) is to prevent consideration of prior convictions as evidence of a general criminal propensity. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). Here, there was no proper purpose identified for admission of the prior convictions. Because the fact of recidivism was not relevant and not admissible for any proper purpose under ER 404(b), the court erred in admitting evidence of Mr. Gamet's prior convictions for violation of a court order.

c. The wrongful admission of irrelevant, prejudicial evidence violated Mr. Gamet's constitutional right to a fair trial.

A criminal defendant has the fundamental due process right to a fair trial. United States v. Salerno, 481 U.S. 739, 750, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987); U.S. Const. amend XIV; Const. Art. I, § 22. Evidentiary rulings may violate due process by depriving a defendant of a fundamentally fair trial. Estelle v. McGuire, 502 U.S. 62, 75, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

A defendant also has the fundamental right to be tried only for the offense charged. State v. Mack, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971); U.S. Const. amend. V; Const. Art. I, § 22. Here, in the absence of a proper basis to admit evidence of Mr. Gamet's prior conviction, admission of that evidence denied him a fair trial.

d. The proper remedy is reversal.

An error resulting in the denial of a constitutional right, such as the right to a fair trial, requires reversal unless the State proves beyond a reasonable doubt the error did not contribute to the verdict. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The State cannot carry that burden here.

Courts have long recognized the unfair prejudice of permitting jurors to hear evidence of prior convictions, and have found such evidence

"is usually excluded except when it is particularly probative" to prove a relevant fact. Spencer v. Texas, 385 U.S. 554, 560, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967).

> First, such evidence is highly prejudicial because the possibility exists that the jury will vote to convict, not because they find the defendant guilty of the charged crime beyond a reasonable doubt, but because they believe the defendant deserves to be punished for a series of immoral actions. Second, the jury may place undue weight or overestimate the probative value of prior acts. Overestimation problems are especially acute where the prior acts are similar to the charged crime. Finally, introduction of other acts of misconduct inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal presumption of innocence is stripped away.

State v. Bowen, 48 Wn. App. 187, 195-96, 738 P.2d 316 (1987), abrogated on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995) (citations omitted).

Here, the evidence clearly established that Mr. Gamet and Ms. Castillo had been in a relationship for at least twelve years and the protection order was issued following Mr. Gamet's 2010 conviction for assaulting her. The State introduced evidence that Mr. Gamet had previously been convicted of violation of a protection order, in 2003 and again in 2004. The jury easily could have concluded that the previous protection orders were similarly issued following a conviction for assault.

As such, it cannot be said that the evidence of prior convictions was harmless. Reversal is required.

4. The trial court exceeded its authority when it imposed combined terms of confinement and community custody that exceeded the statutory maximum sentence for the offenses.

An erroneous sentence may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 521 (1999). The legality of a sentence is reviewed de novo. State v. Franklin, 172 Wn.2d 831, 835, 263 P.3d 585 (2011); In re Pers. Restraint of Brooks, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009).

"A trial court only possesses the power to impose sentences provided by law." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980); accord In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A court's felony sentencing authority derives solely from the Sentencing Reform Act (SRA). RCW 9.94A.505(1).[2]

The term of community custody, when added to the term of confinement, may not exceed the statutory maximum sentence for an offense. "[A] court may not impose a sentence providing for a term of

[2] RCW 9.94A.505(1) provides, "When a person is convicted of a felony, the court shall impose punishment as provided in this chapter."

confinement or community custody that exceeds the statutory maximum for a crime as provided in chapter 9A.20 RCW." RCW 9.94A.505(5).

Mr. Gamet was convicted of eight counts of felony violation of a court order and one count of tampering with a witness, all Class C felonies. RCW 26.50.110(5); RCW 9A.72.120(2). The statutory maximum sentence for a Class C felony is 60 months. RCW 9A.20.021(1). Thus, the sentencing court had authority to impose a 60-month combined total term of confinement and term of community custody.

Based on Mr. Gamet's offender score of '9+,' the trial court imposed a standard range sentence of 60 months of confinement for each offense, to run concurrently, plus 12 months of community custody. CP 107-09, 203-05. The combined terms of confinement and community custody totaled 72 months, 12 months above the statutory maximum. Because the total of these terms exceeded the statutory maximum, the sentence is erroneous.

Where a court imposes a sentence above the maximum authorized by law, the matter must be remanded to the sentencing court.

> The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

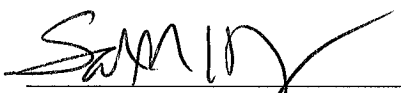
RCW 9.94A.701(9). Accordingly, this matter should be remanded to the sentencing court to reduce the term of community custody to zero months. See State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012); State v. Land, 172 Wn. App. 593, 295 P.3d 783, 786-87 (2013).

E. CONCLUSION

Mr. Gamet's conviction for tampering with a witness must be reversed due to insufficiency of the evidence and instructional error. His convictions for violation of a protection order must be reversed for admission of irrelevant, but inherently prejudicial evidence of prior convictions. The term of community custody that exceeded the statutory maximum must be reduced. For the foregoing reasons, Mr. Gamet respectfully requests this Court to reverse his convictions, or, alternatively, reduce the term of community custody.

DATED this 12th day of July 2013.

Respectfully submitted,



SARAH M. HROBSKY (12352)
Washington Appellate Project (91052)
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. NANAMBI GAMET, Appellant.	)))))))))	NO. 31402-2-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF JULY, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] DAVID TREFRY [TrefryLaw@WeGoWireless.com] ATTORNEY AT LAW PO BOX 4846 SPOKANE, WA 99220-0846	( ) ( ) (X)	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
[X] NANAMBI GAMET 996903 MONROE CORRECTIONAL COMPLEX-TRU PO BOX 888 MONROE, WA 98272-0888	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF JULY, 2013.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710